SUPREME COURT, U.S.
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FILED
FEB 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-1143

JOHN INDIVIGLIO,

*Petitioner.*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOHN INDIVIGLIO, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming the decision and judgment rendered in favor of the appellee herein and against appellant in the United States District Court for the Eastern District of New York for conspiracy and violations of Sections 173 and 174 of Title 21 U.S.C. prior to May 1, 1971 and after May 1, 1971, the violation of Sections 812, 841(a)(1), 841(b)(1)(a), 951(a)(1) and 952 of Title 21 United States Code.

## I.

## SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioner was convicted of conspiracy in spite of the uncontroverted facts where there is no direct evidence linking petitioner with a conspiracy. The only "evidence" linking petitioner to the conspiracy was hearsay by a fellow co-conspirator. There was no corroboration independent of his testimony. The decision was affirmed despite the fact that the jury was permitted over objection to hear, for a second time, a portion of the prosecutor's summation. The defendant, JOHN INDIVIGLIO, is sixty (60) years of age, was never previously convicted of any crime and was sentenced to twelve (12) years of confinement and to special parole of five (5) years.

The record is clear that nobody (a) ever found narcotics in the possession of INDIVIGLIO; (b) purchased any narcotics from him; (c) sold any narcotics to him; or (d) paid any money to him for narcotics. The entire case of the Government rests, admittedly, on circumstantial evidence.* As the Government argued successfully in its brief before the Circuit Court:

> "However, the independent evidence may be entirely circumstantial, United States v. Manfredi, 488 F.2d 588, 596 (2d Cir. 1973), and each piece of evidence should be viewed in conjunction with and drawing color from every other piece of relevant evidence. United States v. Geaney, supra at 1121."

After all the sides had rested, the jury requested a re-reading of the prosecutor's summation. In a case involving only circumstantial evidence against this defendant, the re-reading of the prosecutor's summation tipped the scale against him.

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* Attached as an Appendix is a short summary of the Government's case against Indiviglio.

## II.

## BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under Sec. 1254(1) of Title 28 U.S.C. in that the petitioner has been deprived of his privileges under the Sixth and Fourteenth Amendments of the United States Constitution.

## OPINION BELOW

There was no written opinion by the Circuit Court of Appeals. On January 29, 1975, at the conclusion of arguments by all counsel, the Court orally affirmed the jury conviction of the Court below.

## III.

## QUESTIONS PRESENTED

1. (a) Whether a court may consistent with due process of law required by the Fourteenth Amendment find that there is participation in a criminal conspiracy by the defendant despite the fact that there is no direct evidence linking the defendant to any crime, and despite the fact that the only evidence adduced during the trial was the hearsay evidence of alleged co-conspirators.

(b) May hearsay evidence of alleged conspirators constitute independent proof of participation sufficient to sustain a conviction without any corroboration?

(c) If independent corroboration is not required, does not this finding abrogate the rule of this Court that there must be evidence, independent from co-conspirators, in order to find a defendant guilty and that this independent evidence cannot be so-called statements from co-conspirators.

2. (a) Whether the court should have permitted the jury to re-hear the prosecutor's summation a second time although all parties conceded that the summation is not evidence.

(b) In this particular case where there was no direct evidence and only hearsay evidence of a co-conspirator, did the wrongful re-reading of the prosecutor's summation prejudice defendant by attaching the court's imprimatur to the prosecutor's theory of the case.

## IV.

## REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In its brief before the Circuit Court of Appeals, the attorney for the United States argued quite candidly:

(a) That although the case was built upon circumstantial evidence only, taking all the circumstantial evidence in order, there was sufficient basis for the jury to find the defendant guilty.

(b) The Government's counsel also conceded on the oral argument before the Second Circuit Court of Appeals that he found no legal precedent for a re-reading of a portion of the prosecutor's summation to the jury a second time.

*Re: Point (a)*

In order to convict the defendant, we have only the evidence of alleged co-conspirators who testified as to admissions by the defendant. The only testimony really implicating the defendant was told by Mr. Tyler Somas, a convicted felon who was incarcerated, and his girlfriend, later wife, FAY SOMAS, likewise a felon. Mr. Somas would, of course, say and do anything to get his liberty. The well established rule, both in the United States Supreme Court, *Brown v. United States,* 150 U.S. 93 (1893), and in the Second Circuit, is as follows (*United States v. Santana,* 503 F.2d 710 (2d Cir. 1974)):

> "The settled rule in this Circuit, see United States v. Geaney, 417 F.2d 1116, 1120 (1969), cert. denied, sub. nom. Lynch v. United States, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970) is that the jury will be permitted to consider such hearsay only if the trial judge determines that the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of co-conspirators' declarations."

See also, *United States v. Ragland,* 375 F.2d 471 (2d Cir. 1967) cert. den. 390 U.S. 925 (1968); *United States v. Marrapese,* 486 F.2d 918, 921 (2d Cir. 1973) cert. den. 415 U.S. 994 (1974; *United States v. D'Amato,* 493 F.2d 359 (2d Cir. 1974); *United States v. Santana,* 503 F.2d 710 (2d Cir. 1974); *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974).

However, this rule is reduced to a nullity in practice because the Second Circuit takes the position that if a conspirator alleges *that he heard the defendant Indiviglio make damaging admissions,* this is sufficient independent proof of participation in the conspiracy. No corroboration is required for conviction. With this in mind, the Second Circuit affirmed on the ground that we have admissions by the defendant with regard to his participation in the conspiracy. But these alleged admissions come from co-conspirators and if permitted by this Court would in effect destroy the rule itself. For the purpose of all the Circuits, the United States Supreme Court should affirm the rule that there must be evidence independent of hearsay, independent from co-conspirators in order to find the defendant guilty and *this evidence cannot be so called statements from co-conspirators that they heard incriminating facts from the defendant.*

*Re: Point (b)*

In a case with no direct evidence against JOHN INDIVIGLIO, the Court, over objection of defendant's counsel, permitted the

jury to listen a second time to a portion of the prosecutor's summation which the jury had requested. Since all parties conceded that a prosecutor's summation is not evidence, this re-reading of the prosecutor's summation tipped the scales against INDIVIGLIO.

In oral argument before the Second Circuit, the Government, with admirable frankness, concedes that there is no precedent on the subject. However, there is a precedent against permitting a defense counsel's summation to be reread to the jury and the same rule should apply to a prosecutor's summation.

In the only reported Federal case in which a defense counsel's summation was requested by a jury, *United States v. Guanti*, 421 F.2d 792 (2d Cir. 1970), the Court stated at page 1160(a) of the record on appeal:

> "I have a copy of your note asking for a copy of Mr. LaRossa's summation. You can't have that. That's not evidence. That is an argument. You will have to remember it if you can remember it. He doesn't have two arguments."

On appeal, there was cited as error the supplementary charge given to the jury after they had been out for twenty-four (24) hours. The Circuit Court of Appeals stated at 801:

> "There is also assigned as error a supplementary charge given to the jury after it had been out for 24 hours. The jury returned a verdict of guilty as to all defendants five to twenty minutes after the supplementary instruction. *The jury requested a summation of Dominick's counsel. Since this was not evidence, the request was denied.* The trial judge then gave a restatement of the elements of conspiracy with a statement of the law relating to withdrawal. He did not give a specific charge as to Dominick since he feared that that would suggest that withdrawal was the only issue as to him or that only his guilt was

questionable. This was not objected to as an erroneous statement of law but as unresponsive to the request. There was no error in giving this instruction." (my emphasis)

***Guilt by Association Should not be Encouraged But Discouraged***

The denial of a writ in this case would place great emphasis upon guilt by association, a doctrine which should have been buried with the end of the era of McCarthyism.

We all know, lawyers as well as judges, of the catalogues of prosecutorial evils inherent in a conspiracy trial. Inevitably, in a conspiracy trial, the focus of attention shifts from individual guilt toward guilt by association. While all Courts agree and affirm that mere association with others is not evidence to support a guilty verdict (*United States v. Arroyave*, 477 F.2d 157 (5th Cir. 1973); *United States v. DiRe*, 159 F.2d 818 (2d Cir. 1947) aff'd. 332 U.S. 581 (1958); *Ong Way Jong v. United States*, 245 F.2d 392, 394 (9th Cir. 1957)), this rule is often overlooked in the fracas of an actual trial. Since in a conspiracy prosecution, the act of any alleged conspirator is attributable to the other, is admissible in evidence, with hearsay evidence going so far as to violate one's constitutional right to confront one's accusers, then the rule against guilt by association becomes terribly diluted. Such, we respectfully submit, is the case here with Mr. Indiviglio.

Obviously, it was, therefore, crucial for the prosecution as part of its case to prove an agreement existed between Aguiar, McCormack and Indiviglio. A reading of the testimony of Somas reveals that he never saw any narcotics transactions involving John Indiviglio. Fay Somas testified that she never saw Indiviglio sell any drugs. However, after being prodded by the U.S. Attorney, she says that she heard that Mr. Indiviglio was importing drugs into the United States via automobiles. Aguiar testified that McCormack says he got heroin from Indiviglio.

McCormack never took the stand and never testified about

anything. It, therefore, becomes crucial on the part of the prosecution to have independent testimony about Indiviglio's part in this alleged conspiracy and overt acts other than hearsay testimony. It is well known that there must be evidence of both an agreement and an overt act to establish a crime of conspiracy. An overt act without an agreement is insufficient. See *United States v. Williams*, 503 F.2d 50 (6th Cir. 1974):

> "Thus, with regard to Johnson, there is at most the showing of an overt act. This is insufficient to sustain a conspiracy conviction. United States v. Sarno, 456 F. 2d 875 (1st Cir. 1972); Schnautz v. United States, 263 F.2d 525 (5th Cir., 1959); Hall v. United States, 109 F.2d 976 (10th Cir., 1940); cf. Condrey v. United States, 351 F.2d 456 (5th Cir., 1965)."

But in this sense, the case is barren of any evidence, as opposed to suspicion that defendant Indiviglio illegally acted. When viewed in the cold light of reason, the most that could be said is that suspicions are aroused. But this does not permit a conviction of a sixty (60) year old man heretofore never convicted of any crime to rest on mere suspicion or surmise, or inference drawn upon inference. Some direct evidence had to go in, independent of co-conspirator's statements, in order to sustain a conviction of Indiviglio. This we submit is plainly lacking in this case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said United States Court of Appeals for the Second Circuit in the case numbered and entitled on its Docket No. 74-2319, UNITED STATES OF AMERICA v. JOHN INDIVIGLIO, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment

herein of said United States Court of Appeals for the Second Circuit be reversed by the Court, and for such further relief as to this Court may be proper.

Dated February 26, 1975.

Respectfully submitted,

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New York, New York 10017
(212) MU 6-6780

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN INDIVIGLIO, being duly sworn, deposes and says:

That he is the petitioner in the within proceeding, that he has read and knows the contents of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those he believes it to be true.

John Indiviglio
JOHN INDIVIGLIO

Sworn to before me this 26th
day of February, 1975

Joseph Winston
JOSEPH WINSTON
Notary Public, State of New York
No. 41-9707900
Qualified in Queens County
Term Expires March 30, 1976